

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

**In Re: Atrium Medical Corp. C-Qur Mesh
Products Liability Litigation (MDL No. 2753)**

**MDL Docket No. 16-md-2753-LM
ALL CASES**

ORDER

This multi-district litigation (MDL) proceeding involves plaintiffs' suits against Atrium Medical Corporation ("Atrium"), a medical device company that manufactured and sold C-QUR mesh, and a related company, Maquet Cardiovascular US Sales, LLC ("Maquet"), claiming that C-QUR mesh was, among other things, defective and unreasonably dangerous and caused injury when surgically implanted for hernia repair. This MDL proceeding has been underway for over three years. The parties are approaching the end of case-specific discovery in trial pool cases and beginning preparations for the first bellwether trial. Defendants move to extend deadlines and the first bellwether trial date due to the extraordinary circumstances caused by the outbreak of COVID-19 and other delays encountered in the course of expert discovery. Doc. no. [1197](#). Plaintiffs object.

The timeline of current deadlines is approximately as follows:

- Mid-April: Selections and strikes of trial pool cases by both parties
- Early May: Defendants' disclosure of regulatory and pathology experts
- By Agreement: Expert discovery deadline in trial pool cases
- Mid-May to early June: Deadlines for filing of dispositive and Daubert motions in trial pool cases, including time for filing responses and replies
- June: Parties confer and attempt to reach agreement on first case to be tried
- August: Deadline for settlement conference regarding first trial pool case
- September: First bellwether trial

See Endorsed Order Feb. 7, 2020 (granting joint assented-to motion to extend deadlines, doc. no. [1182](#)). Defendants request that the court extend all the current deadlines by 90 days and

reschedule the first trial date to January 2021. They argue that this extension is necessary for two primary reasons: (1) the COVID-19 outbreak renders the completion of expert discovery difficult or impracticable; and (2) defendants require additional time to complete expert discovery necessitated by plaintiffs' late-disclosure of pathology expert Dr. Christine Knabe, including time to designate their own pathology expert and supplement other expert discovery. With respect to remaining expert discovery, defendants contend that they still need to depose Dr. Knabe and plaintiffs' regulatory expert, Dr. Peggy Pence, and that there are five defense experts that plaintiffs have yet to depose. Plaintiffs argue that there is no need to delay trial or other deadlines because discovery is nearly complete and the current trial date is almost five months away. To keep the case on track, plaintiffs offer to forego deposing the remaining defense experts.¹ They argue that the only other outstanding depositions—of Drs. Knabe and Pence—can be conducted promptly and remotely by video-conference.

I. Extension of Deadlines

Under the circumstances presented, it is unnecessary at this time to reschedule the first trial date. But the court finds that a short extension of other deadlines is warranted. This extension is primarily justified by the discovery delays caused by plaintiffs' late-disclosure of Dr. Knabe in one of the trial pool cases, Hicks v. Atrium, No. 17-cv-00070-LM. As detailed in this court's order denying defendants' motion to strike Dr. Knabe and her expert report, plaintiffs late-disclosed Dr. Knabe and could have done more to communicate with opposing counsel about the reasons for her late disclosure. See Hicks v. Atrium, No. 17-cv-00070-LM, (Doc. no. 189, Mar. 19, 2020). Although the court found plaintiffs' late-disclosure of Dr. Knabe

¹ Plaintiffs offer to forego deposing defendants' remaining experts with the caveat that they reserve the right to depose defendants' yet undisclosed pathology expert if necessary.

substantially justified and harmless, it was the court's intention to ensure that Dr. Knabe's late disclosure was indeed harmless by extending deadlines as necessary to allow defendants the opportunity to depose Dr. Knabe, designate their own pathology expert, and amend or supplement other expert reports as needed.² The extension of deadlines is also justified in light of defendants' agreement to allow the late-disclosure of Dr. Pence after plaintiffs' first regulatory expert withdrew for health reasons. Defendants need time to depose Dr. Pence and disclose any responsive regulatory expert.

The court will allow the extension of deadlines as outlined in the chart below to accommodate the remaining discovery. The extensions outlined below presume that plaintiffs are still willing to forego deposing the remaining defense experts. If that is not the case—that is, if plaintiffs wish to depose the five remaining defense experts, as is their right—the court will revisit the extension of deadlines.

The court extends the below deadlines as follows:

Event	Prior Deadline	New Deadline
Rebuttal expert reports due in trial pool cases	March 10, 2020	May 29, 2020
Defendants' expert disclosure of regulatory and pathology expert and supplemental/amended reports of Defendants' previously disclosed experts	May 9, 2020	May 22, 2020
Each side is permitted to strike one case from among the trial pool cases by notifying Lead Counsel for the other side	April 14, 2020	May 14, 2020 ³

² The court assumed that the parties would be able to agree to reasonable extensions of deadlines to accommodate this additional discovery; the parties have proven that assumption incorrect.

³ Defendants argue that they should be permitted to complete expert discovery prior to having to elect which trial pool cases to strike or select. But even under the prior schedule, the deadlines for striking and selecting were scheduled before the close of all expert discovery. For example, as depicted in the chart, defendants' prior deadline for disclosure of their regulatory and pathology experts was after the deadlines for striking and selecting cases.

Event	Prior Deadline	New Deadline
Each side is permitted to select one case from among the trial pool cases by notifying Lead Counsel for the other side	April 15, 2020	May 15, 2020
Expert discovery deadline in trial pool cases	Per Agreement	June 5, 2020
Dispositive or Daubert motions due re: trial pick cases	May 13, 2020	June 12, 2020
Responses to dispositive or Daubert motions due re: trial pick cases	May 27, 2020	June 26, 2020
Replies to dispositive or Daubert motions due re: trial pick cases	June 3, 2020	July 3, 2020
After conferring regarding the first case to be tried, the manner of trial, and the timing of the second case to be tried, the parties shall submit a report to the Court indicating those matters as to which agreement has been reached and setting forth their positions as to all matters where agreement was not reached	June 4, 2020	July 8, 2020
If agreement cannot be reached on 1 st case to be tried, the Court will select a case from the 2 cases selected by the parties	June 24, 2020	July 13, 2020
Deadline for Settlement conference for first trial pool case	August 3, 2020	August 3, 2020
First trial	September 16, 2020	September 16, 2020

The parties are free to modify the above deadlines by their mutual agreement.

II. Method of Conducting Depositions

The court, like many other institutions, has modified its normal procedures to ensure that justice can still be delivered effectively and efficiently during this crisis, including by conducting civil and criminal hearings remotely by telephone and video-conference. See Standing Order 20-5, Mar. 20, 2020 (Court Operations Under the Exigent Circumstances Created by COVID-19); Standing Order 20-7, Mar. 23, 2020 (Procedures Governing Out-Of-Court Videoconference and Telephonic Hearings Necessitated Due to the Exigent Circumstances Created by COVID-19).

Likewise, in this MDL proceeding, some departures from typical practice must be made. Given the continuing COVID-19 outbreak and corresponding restrictions on travel and gatherings (and the uncertainty about how long those restrictions will remain in place), the court finds it necessary that any remaining depositions in this case be taken by telephone or video-conference.

All depositions in this action may be taken via telephone, videoconference, or other remote means, and may be recorded by any reliable audio or audiovisual means. See Fed. R. Civ. P. 30(b)(3)-(4). Any remotely conducted deposition must still satisfy the requirements set forth in Federal Rule of Civil Procedure 30(b)(5), including the requirement that, unless the parties stipulate otherwise, the deposition be “conducted before an officer appointed or designated under Rule 28,” and that the deponent be placed under oath by that officer. Fed. R. Civ. P. 30(b)(5). To be clear, a deposition will be deemed to have been conducted “before” an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.

III. Conclusion

For the foregoing reasons, the court grants defendants’ motion to extend deadlines (doc. no. 1197) in part and denies it in part as set forth in the chart included in this order.

SO ORDERED.



Landya McCafferty
United States District Judge

April 30, 2020

cc: Counsel of Record